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ALEXANDER L. STEVAS.

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No. 82-1724

IN THE

# Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,

*Petitioner,*

vs.

ROBERT UPLINGER and SUSAN BUTLER,

*Respondents.*

ON WRIT OF CERTIORARI TO THE  
NEW YORK STATE COURT OF APPEALS.

## RESPONSE OF RESPONDENT ROBERT UPLINGER TO STATE'S OBJECTIONS TO FILING OF *AMICUS CURIAE* BRIEFS

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GLOSSARY.

The following terms of art and abbreviations are used in this Brief.

Cert. Pet. = Petition for Certiorari, filed April 22, 1983.

State's Brief = Brief for Petitioner filed with this Court November 17, 1983.

Uplinger Brief = Brief of Respondent Robert Uplinger, dated December 8, 1983.

Attorney General's (or A.G.) Brief = Brief *Amicus Curiae* of the Attorney General of the State of New York (Robert Abrams), filed December, 1983.

AAPP Brief = Brief of the American Association for Personal Privacy. The Sex Information and Education Council of the United States (SIECUS), The Coalition on Sexuality and Disability, and the Society for the Scientific Study of Sex, submitted for filing December, 1983.

ACLU Brief = Brief of the American Civil Liberties Union and the New York Civil Liberties Union, *Amici Curiae*, dated December 16, 1983.

APA Brief = Brief of *Amici Curiae* American Psychological Association, American Psychiatric Association and American Public Health Association in Support of Respondents, dated December 17, 1983.

iv.

Bar Brief = Brief of the Committees on Sex and Law, Civil Rights, Criminal Law, and Criminal Courts of the Association of the Bar of the City of New York on Behalf of Respondent Uplinger, submitted for filing December, 1983.

CCR Brief = Brief *Amicus Curiae* of Center for Constitutional Rights and National Lawyers Guild in Support of Respondents, dated December 17, 1983.

Lambda Brief = Brief of Lambda Legal Defense and Education Fund, Inc. on Behalf of Respondent Uplinger, dated December 17, 1983.

NABC Brief = *Amicus Curiae* Brief of the National Association of Business Councils [and several other organizations and individuals], submitted for filing December, 1983.

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**RESPONSE OF RESPONDENT ROBERT UPLINGER  
TO STATE'S OBJECTIONS TO FILING OF  
AMICUS CURIAE BRIEFS**

Petitioner is objecting to the filing of all *amicus* briefs (other than that of the New York Attorney General). The principal objections are, first, that a particular brief is directed at the question of the power of the state to "outlaw homosexuality" [referring to the right of privacy issue decided by *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. den.* 451 U.S. 987

(1981)], which issue is not presented by petitioner for decision herein; second, that issues addressed have been "well briefed" by one or both respondents already; third, that the particular *amicus curiae* does not have a "substantial interest" or "stake" in the outcome of the case sufficient to justify filing of its brief; and, fourth, that the brief will not "assist" this Court.

With particular reference to the CCR Brief,<sup>1</sup> the State claims that the *amicus* distorts the record in an "adversarial, argumentative statement of the facts" and improperly "concentrates on the City Court decision". Comparison of the CCR Brief, 1-9, with the record will illustrate the accuracy of the factual statement, based, as it is, on factual observations rather than on hearsay and conclusory police assumptions. Furthermore, neither the County Court decision nor the dissent in the Court of Appeals rejected the factual findings and conclusions in the trial court; reference to those findings and conclusions in the CCR Brief is appropriate to the arguments there made.

Respondent Uplinger is confident that his Brief herein and the applicable constitutional provisions fully support affirmance of the judgment below. In some instances, respondent Uplinger does not agree with arguments or conclusions proffered by the *amicus* briefs. Nonetheless, it is believed that the *amicus* briefs offered herein will provide this Court with additional perspectives and a pool of information, useful in the Court's consideration of the case.

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<sup>1</sup> See Glossary, *supra*.



Moreover, the State has consented to submission of *amicus* briefs in the court below, while seeking to deny the benefit thereof to this Court.<sup>2</sup>

Beyond the foregoing general comments, respondent makes the following observations.

A. Arguments and materials in the *amicus* briefs regarding the right of privacy are relevant for this Court's consideration in the present proceeding.

Respondent Uplinger has argued that this Court should probably not review *Onofre, supra*, under *Illinois v. Gates*, \_\_\_\_\_ U.S. \_\_\_\_\_ (1983), 76 L.Ed.2d 527 [Uplinger Brief, 9-11]; if the *Onofre* issue is "necessarily implicated" (*id.* at 11), respondent argues that the legal conclusions reached in *Onofre* should be upheld. *Id.*, 39-44.

The Attorney General's Brief argues that the decision below was grounded on the constitutional right of privacy (A.G. Brief, 12) and further urges that Penal Law §240.35-3 unduly burdens the exercise of the "right to privacy in sexual matters" (*id.* 15-16). Compare Bar Brief, 5-6, fn. 2 ("unclear from the opinion below whether the court's holding is based on privacy considerations"). Other *amici* urge this Court not to reach the *Onofre* issues (*e.g.* ACLU Brief, 3; APA Brief, 5-8) or ask for dismissal of the writ as improvidently granted (NABC Brief, 5 *et seq.*, *esp.* 16). While asserting it is not

<sup>2</sup> The Erie County District Attorney interposed no objection to the filing of *amicus* briefs with the New York Court of Appeals in this case. Separate *amicus* briefs were filed in that Court by Lambda Legal Defense and Education Fund, Inc., Center for Constitutional Rights and New York Civil Liberties Union, three of the *amici* who have tendered briefs to this Court. See *People v. Uplinger*, 58 N.Y.2d 936 (1983).



necessary to reach *Onofre*, the CCR Brief argues that Uplinger's speech here was itself protected by the right to privacy. CCR Brief, 54-58.

Petitioner claims it has not presented the *Onofre* question in its Brief and that the issue is therefore not before this Court. This is not a civil case wherein the parties can stipulate an issue out of the case. Significantly, the State does not concede *Onofre*'s correctness; it simply does "not deal with" that question. State's Brief, 2. Cf. Cert. Pet., 6, fn. 1 (*People v. Onofre* "an unfounded decision").

This Court will wish to consider whether the privacy right is "necessarily implicated" in the decision below and, if it is, what disposition should be made of that issue. On both questions, the various *amicus* briefs will be helpful.

**B. The *amicus* briefs do not unduly repeat arguments made by the parties and will assist this Court.**

While the independent filing of eight, separate *amicus* briefs will necessarily involve some repetition of arguments made by the parties on an issue of significant public and constitutional importance, the additional briefs present different aspects of the problem from those argued by the parties. To the extent of duplication, additional authorities are found. Any clear duplication will be easily recognized and passed over by the Court when the matter is under review for decision.

There are significant differences in the approach by various *amici* from that taken by respondents, however. For example:

1. The argument for a right of privacy attaching to Uplinger's conversation as a part of the right to sexual privacy [A.G. Brief, 12-16; CCR Brief, 54-58;

Bar Brief, 15-18; Lambda Brief, 10-25, *esp.* 14-15] goes beyond the more limited privacy argument made by Uplinger. Uplinger Brief, 39-44, *esp.* 41-42 (privacy right limited to the "front door").

2. Uplinger argues that the loitering law is aimed at homosexuals. Uplinger Brief, 15, 34. Implicit is the question whether such a discriminatory classification is constitutionally permissible. Information regarding homosexuality and variant sex practices in present-day America (*e.g.* AAPP Brief, *passim*; APA Brief, 8-21) is directly useful to this Court in considering this question.

3. Uplinger's argument of underinclusiveness (Uplinger Brief, 34-35) is substantially expanded upon in the CCR Brief (41-48) and the Lambda Brief (30-32).

4. The NABC Brief alone presents considerations which may be of interest on the question of possible dismissal of the writ as improvidently granted, particularly in light of petitioner's unexpected decision not to present the *Onofre* question, made after this Court granted certiorari on a petition which requested review of that question.

5. The ACLU Brief presents other state cases which have struck down solicitation statutes where the object was not unlawful. ACLU Brief, 23.

C. The *amici* have an appropriate "interest" to support their briefs.

Petitioner argues that the various *amici* have no "concrete, substantial interest" and, in some cases, "no legitimate interest" to justify allowance of the briefs. The State betrays a misunderstanding of the function of an *amicus curiae*. It is not a party; its interest in the outcome is designed not to be specific like a party's concern but, rather, of a general nature related to a cause, idea or public concern.

The various *amici* before the Court are either involved in civil liberties issues (ACLU Brief), scientific, sociological, medical and emotional health concerns relating to sex (APA and AAPP Briefs), study and advocacy of particular legal interests (AAPP, CCR and Bar Briefs) or particularized activities for the improvement and protection of the rights of homosexuals, the group most directly affected by the statute (Lambda and NABC Briefs).

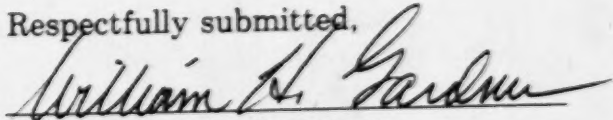
While permission for filing *amicus* briefs over a party's opposition rests with the discretion of this Court, that discretion should not be exercised on any premise that the various *amici* lack sufficient interest or standing to file briefs in that status.

#### Conclusion

Respondent Uplinger respectfully recommends that the Court grant the motions of the various *amici* herein.

Dated: January 2, 1984

Respectfully submitted,



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